

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



# 74-2180

To be argued by  
GEORGE B. KENNER

**ORIGINAL**

In The

United States Court of Appeals

For The Second Circuit

MASSACHUSETTS MUTUAL LIFE INSURANCE  
COMPANY,

*Plaintiff,*

- against -

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF  
HAMPDEN COUNTY, STERLING NATIONAL BANK &  
TRUST COMPANY OF NEW YORK, NATIONAL BANK  
OF NORTH AMERICA, DASHA AUERBACH STUART,  
Executrix under Last Will and Testament of Josef Auerbach,  
IRVING GEIST, KENNETH DEMBSKI, ROYAL S.  
MARKS, SAMUEL HADDAD, NATALIE HADDAD,  
HENRY HECHT, SR., ALICE HECHT, MARY ELLEN  
HECHT AND HENRY HECHT, JR.,

*Defendants,*

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF  
HAMPDEN COUNTY and DASHA AUERBACH STUART,  
Executrix under Last Will and Testament of Josef Auerbach,

*Defendants-Appellees*

- and -

ROBERT B. SCHINDLER, as Trustee in Bankruptcy of  
LAWRENCE E. SIMON,

*Intervenor-Appellant*

## BRIEF FOR DEFENDANT-APPELLEE, LAWRENCE E. SIMON

YELLIN, KENNER & LEVY

*Attorneys for Defendant-Appellee*

*Lawrence E. Simon*

225 West 34th Street

New York, New York 10001

(212) 594-0060

(7901)

LUTZ APPELLATE PRINTERS, INC.  
Law and Financial Printing

South River, N. J.  
(201) 257-6860

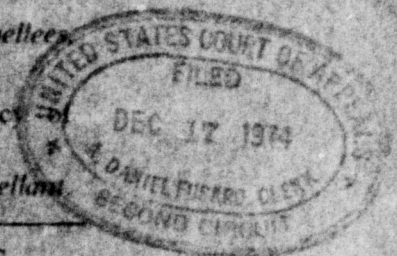
New York, N. Y.  
(212) 566-6377

Philadelphia, Pa.  
(215) 563-5387

Washington, D. C.  
(202) 783-7288

B

P/S



## TABLE OF CONTENTS

	Page
Issues Presented . . . . .	1
Statement of the Case . . . . .	1
Statement of Facts . . . . .	2
Point I. Pursuant to the provisions of §70(a) of the Bankruptcy Act, the Floor Plan Payments accruing to Simon after January 1, 1971 did not pass to the Trustee but became an asset of Simon. . . . .	3
Point II. The Floor Plan Payments were completely distinguishable from the renewal commissions and by reason thereof, did not pass to the Trustee. . . .	6
Conclusion . . . . .	7

## TABLE OF CITATIONS

### Cases Cited:

Friedman v. McHugh, 168 F.2d 350 (1st Cir. 1948) . . . . .	5
In Re Baxter, 104 F.2d 318 (6th Cir. 1939) .	4
In Re Wright, 157 F. 544 (2d, Cir. 1907) . . .	4, 6



Contents

Page

Statute Cited:

Bankruptcy Act, Sec. 70(a) . . . . . 3, 5

Other Authority Cited:

4 A, Colliers on Bankruptcy, §70.27 . . . . . 5

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,  
Plaintiff,

-against-

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF  
HAMPDEN COUNTY, STERLING NATIONAL BANK & TRUST  
COMPANY OF NEW YORK, NATIONAL BANK OF NORTH  
AMERICA, DASHA AUERBACH STUART, Executrix under  
Last Will and Testament of Josef Auerbach, IRVING  
GEIST, KENNETH DEMBSKI, ROYAL S. MARKS, SAMUEL  
HADDAD, NATALIE HADDAD, HENRY HECHT, SR., ALICE  
HECHT, MARY ELLEN HECHT AND HENRY HECHT, JR.,

Defendants,

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPDEN  
COUNTY and DASHA AUERBACH STUART, Executrix under  
Last Will and Testament of Josef Auerbach,

Defendant-Appellees,

-and-

ROBERT B. SCHINDLER, as Trustee in Bankruptcy of  
LAWRENCE E. SIMON,

Intervenor-Appellant.

-----x



### ISSUES PRESENTED

1. Whether the Trustee in Bankruptcy of the bankrupt, LAWRENCE E. SIMON, acquired title to the "Floor Plan Payments" referred to in the Final Judgment rendered by the Court below, as of the time of filing of the petition in bankruptcy herein.
2. Whether said Floor Plan Payments are distinguishable from the renewal commissions earned by SIMON in connection with insurance policies sold by him for the Massachusetts Mutual Life Insurance Company, and as stated in the final judgment rendered by the Court below.

### STATEMENT OF THE CASE

This interpleader action was commenced by the Massachusetts Mutual Life Insurance Company (Mass Mutual) on May 12, 1970. To date there is on deposit to the credit of the registry of this Court an aggregate amount of \$332,948.05, of which approximately \$160,000.00 represents General Agents Floor Plan payments, and the remainder represents General Agents renewal commissions. Assuming that LAWRENCE E. SIMON (Simon) will be alive on January 1, 1975, the 1974 Floor Plan Payment of \$27,888 will be payable in addition to the foregoing. If the Final Judgment of the Court below is affirmed, these funds will be distributed as set forth therein to the several persons entitled thereto. The Trustee in

Bankruptcy of Lawrence E. Simon is the Intervenor-Appellant herein. The Third National Bank of Hampden County, the Estate of Josef Auerbach and Lawrence E. Simon are the Defendant-Appellees herein. There are other defendants, in addition, who are apparently not involved directly in this appeal.

#### STATEMENT OF FACTS

Simon was a General Agent for Mass Mutual under a General Agent's Agreement since July 31, 1932 (Exhibit A to complaint). In or about November 10, 1938 he entered into a loan agreement with the Third National Bank and executed an assignment of his renewal commissions. (Emphasis supplied) On December 31, 1962 Simon's general agency agreement terminated and he retired as General Agent. On September 16, 1964 Simon and Mass Mutual entered into a "Floor Plan Agreement". (Exhibit C of the complaint and Stipulation of Fact 15). This agreement was terminable at will by Mass Mutual. The Floor Plan provided for payments to Simon of \$27,888 a year by Mass Mutual so long as he lives provided he met certain requirements of the company, i.e. Mass Mutual, and if his commissions per annum fell below that amount in any year. All the facts relating to Simon's dealings with the said bank, as well as his obligations to and dealings with other judgment creditors are set forth in great detail in the Findings of Fact in the report of the Special Master, Honorable



Gerard L. Goettel, United States Magistrate. This report and its proposed rulings and a Supplementary Report were approved and adopted by the Court below on July 3, 1974 in its Memorandum filed herein on said date, and confirmed in their entirety by the Final Judgment of the Court below rendered July 29, 1974 and filed July 31, 1974.

POINT 1

PURSUANT TO THE PROVISIONS OF §70(a) OF THE BANKRUPTCY ACT, THE FLOOR PLAN PAYMENTS ACCRUING TO SIMON AFTER JANUARY 1, 1971 DID NOT PASS TO THE TRUSTEE BUT BECAME AN ASSET OF SIMON.

§70(a) of the Bankruptcy Act states, amongst other things:

"The Trustee of the estate of a bankrupt and his successor or successors if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title...." (Emphasis supplied)

Said §70(a) continues in (5) referring to title of property of the bankrupt vested in the Trustee at the time of the filing of the petition as follows:

"(5) Property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered...."

If Simon, the bankrupt, could have transferred his rights to the Floor Plan payments, they would have passed to

his Trustee even though the interest is contingent and defeasible. However, the Floor Plan Agreement made by Simon with Mass Mutual on September 16, 1964 (Exhibit C of the complaint herein) provides amongst other things in paragraph 5 as follows:

"5. This Agreement shall terminate on:

- (a) the death of the General Agent; or
- (b) violation by the General Agent of the provisions of Paragraph 2(b); or
- (c) revocation by the Company as of any anniversary of the date of termination of the Contract."

The Special Master in his report to the Court below, on pages 41 and 42, stated as follows:

"There still remains the disposition of the floor plan credits after the Stuart judgment (with interest) has been satisfied. If the bankrupt could have transferred his rights, they pass to his trustee even though the interest is contingent and defeasible. In Re Wright, supra; In Re Baxter, 104 F.2d 318 (6th Cir. 1939). Although the insurance company could, in its own discretion, terminate these payments, it could not do so before the anniversary date of the termination of the contract. Consequently, when Simon was adjudicated a bankrupt on July 21, 1970 the floor plan payments were assignable for the rest of the year and, to the extent not necessary to satisfy Stuart's judgment, shall pass to the Trustee.

The status of the floor plan payments which occurred after January 1, 1971 is a more complex and unique question. While they have some characteristics of vested renewal commissions, and some of a pension, on the face of the agreement, and to the extent that the evidence shows, the continued payment by Mass. Mutual is a gratuity. As a contingent gratuity it would not appear to be assignable. Although Mass. Mutual saw fit to pay these benefits in 1971 and 1972 (the record is not explicit as to 1973 but, the inference was that the



benefit is still accruing) this could not have been foreseen with any certainty at the time of bankruptcy. Section 70(a) was amended in 1938 to include as vesting in the Trustee, bequests, devises and inheritances which vest in the bankrupt within six months after bankruptcy. "Bequests", however, have been interpreted as being limited to testate successors under a will. 4 A. Colliers on Bankruptcy, §70.27; Friedman v. McHugh, 168 F.2d 350 (1st. Cir. 1948). These assets, therefore, should be paid to Simon."

The Court below in the Memorandum of July 3, 1974 approved and adopted the rulings proposed by Magistrate Goettel and rendered his Final Judgment on July 31, 1974, which decreed in part, in respect to said Floor Plan Payments, as follows:

"(3) To the Intervenor Robert B. Schindler, as Trustee in Bankruptcy of Lawrence F. Simon, any floor plan payments for the year 1970 remaining after the distribution to the defendant Stuart described in paragraph (2) above;

(4) To defendant Lawrence E. Simon, any floor plan payments accruing after January 1, 1971 remaining after the distributions described in paragraphs (2) and (3) above;"

On July 21, 1970 Simon filed a bankruptcy petition in the United States District Court for the Southern District of New York and was adjudicated a bankrupt on the same day. (Par. 33 of the Stipulation of Facts). On the date of the filing of the petition, Simon had no **property** rights in and to the said Floor Plan payments to be made thereafter for the reason that the payments would be made only if Simon were alive on January 1 of any year during which payments would be made. Furthermore, these **Floor Plan Payments**, which amounted to \$27,888 per annum, were revocable at will by Mass Mutual. Consequently, he had no vested property right as distinguished from renewal commissions earned on

policies sold by him for Mass Mutual.

POINT II

THE FLOOR PLAN PAYMENTS WERE COMPLETELY  
DISTINGUISHABLE FROM THE RENEWAL COMMISSIONS  
AND, BY REASON THEREOF, DID NOT PASS TO THE  
TRUSTEE.

---

The Special Master, in his report on pages 37 and 38,  
stated as follows:

"In this Circuit, however, it was long ago held that the Trustee in Bankruptcy takes title to renewal commissions on policies sold prior to Bankruptcy, even if, under the agency contract, there were additional services to be performed in order to earn the commissions. In Re Wright, 157 F. 544 (2d Cir. 1907). The Court in Wright took cognizance of the fact that the agent did not have a property right in praesenti, and that his interest was contingent and defeasible. After looking to see whether the contract right was assignable, and having found that it was, the Court held that it was transferred to the Trustee under the Bankruptcy Act, stating:

'...the fact that the interest is defeasible does not prevent its transfer. Defeasible and contingent interests of this nature **are** assignable'. 157 F. 544, at 546.

The Court noted that the bankrupt had certain functions to be performed in connection with the collection of the renewal premiums and exempted from the property to be transferred to the Trustee a collection charge. No such functions appear in Simon's contract. Consequently, the Trustee has priority over Simon to the renewal commissions."

The renewal commissions were earned by Simon for premiums paid on policies sold by him for Mass Mutual. In this respect, the renewal commissions fell into an entirely different category and were assignable and transferable. In such case,



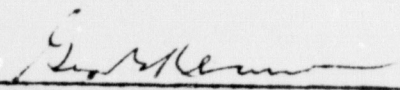
title to such renewal commissions, if any existed, would be deemed passed to the Trustee at the time of the filing of the petition. The Floor Plan, as stated aforesaid, was actually a gratuitous payment to be made by Mass Mutual from year to year so long as Simon was alive on January 1 of that year, and so long as the insurance company did not revoke these Floor Payments which, incidentally, it has had and still has a right to do at any time.

CONCLUSION

THAT PORTION OF THE JUDGMENT WHICH GRANTS  
SIMON FLOOR PLAN PAYMENTS AFTER JANUARY 1,  
1971 SHOULD BE AFFIRMED AND THE ACCUMULATED  
FLOOR PLAN PAYMENTS SHOULD PASS AND BE PAID  
TO SIMON IN ACCORDANCE WITH THE FINAL JUDGMENT  
OF THE COURT BELOW.

Respectfully submitted,

YELLIN, KENNER & LEVY  
Attorneys for Lawrence E. Simon,  
Defendant-Appellee

By:   
GEORGE B. KENNER, a partner

US COURT OF APPEALS: SECOND CIRCUIT

MASS. MUTUAL LIFE INS. CO.,

Plaintiff,

against

SIMON, et al,

Defendants

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,  
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York  
That on the 17th day of December 1974 at \*

deponent served the annexed Appellants Brief

upon

*cc's*  
*gs (by RTB)*

the in this action by delivering <sup>2</sup> a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 17th  
day of December 19 74

*Victor Ortega*  
Print name beneath signature

VICTOR ORTEGA

*Robert T. Brin*

ROBERT T. BRIN  
NOTARY PUBLIC, STATE OF NEW YORK  
NO. 31 - 0418950  
QUALIFIED IN NEW YORK COUNTY  
COMMISSION EXPIRES MARCH 30, 1975

- \* Friend, Post & Hox Hopkins- 1 Madison Ave., NY
- \* ~~Bl~~ Bleakley, Platt, Schmidt, Hart & Fritz-120 Broadway, NY
- \* Otterbourg, Steindler - Houston, & Rosen-  
230 Park Ave., New York
- \* Sheldon & Lowe, 41 E. 42nd Street, New York



